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In the Supreme Court of the United States

No. 74-1518

THE TELEX CORPORATION and TELEX COMPUTER PRODUCTS, INC.
Petitioners,

vs.

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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(Appendix to the Petition is in a separate volume)

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Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

The Telex Corporation and Telex Computer Products, Inc. (hereafter collectively referred to as "Telex") pray that a writ of certiorari issue to review the judgment entered on January 24, 1975, by the United States Court of Appeals for the Tenth Circuit in *The Telex Corporation and Telex Computer Products, Inc. v. International Business Machines Corporation,* Nos. 73-1874 through 73-1878, 73-1961 and 73-1962.

OPINIONS

The opinion of the Court of Appeals is reported in 510 F.2d 894 and in 1975 Trade Cas. ¶ 60,127. Appendix C to this petition is a copy; Appendix D is the judgment of that court. The district court's opinion is in its Amended Findings of Fact and Conclusions of Law and is reported in 367 F.Supp. 258 and 1973-2

All emphases in quotations in this petition are added unless otherwise stated.

Trade Cas. ¶ 74,774. Appendix A is a copy; the district court's judgment appears in Appendix B.[1]

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Court of Appeals rendered its decision on January 24, 1975, followed by an opinion on January 28, 1975. A timely petition for rehearing was denied on March 27, 1975 (App. E). The Court of Appeals had jurisdiction under 28 U.S.C. §§ 1291, 1292(b) and 1294(1) of the appeals from the District Court for the Northern District of Oklahoma. The district court had jurisdiction of the complaints under 28 U.S.C. § 1337 and § 4 of the Clayton Act (15 U.S.C. § 15) and of defendant's counterclaims under 28 U.S.C. § 1331(a), § 1332(a), and 17 U.S.C. § 101.

QUESTIONS PRESENTED

I. Contrary to Judge Learned Hand's opinion in the *Alcoa* case, 148 F.2d 416 (2 Cir. 1946), the court below held that if monopoly power has been attained by "legitimate means," it may be lawfully *maintained* by use of "ordinary business practices typical of those used in a competitive market", "utilizing market devices already employed by others in the market," and the monopolist may "reduce prices not below a point where they will derive a reasonable profit," although its explicit design, intent, and purpose and the effect of its practices are to drive out competitors and maintain the monopoly position. Can this possibly be the law under Sherman Act, Section 2? The important questions, presented by the conduct of respondent ("IBM"), of what constitutes unlawful monopolization under Section 2 may be variously phrased thus:

(a) Is not the possessor of monopoly power subject to the same restrictions on conduct to maintain that power whether it was attained unlawfully or by growth? Did not the Court of Appeals err in holding otherwise?

1. The appendices to this petition, being long, appear in a separate volume. Reference to the Appendix is by the symbol "App." followed by a page number.

(b) Is it not the very essence of the offense denounced by Section 2 that the possession of monopoly power imposes limitations not applicable to one not having such power?

(c) Is there any defense to a charge of monopolization other than that the monopoly power was not only acquired but continues to exist without having been contributed to in any way by the monopolist's own affirmative acts? Does not the presence of intent and purpose of the monopolist's acts to contain and destroy competition eliminate any defense whatever?

(d) Is not what Section 2 condemns as unlawful monopoly a condition or state of affairs? And is that not so regardless of whether the condition is produced or maintained by acts thought to be "unfair" or morally "reprehensible"?

II. IBM, the possessor of monopoly power, acting with the deliberate purpose of destroying present competition and forestalling potential competition in order to maintain its monopoly, cuts prices to a level at which competitors cannot survive, ties up the market with long-term leases so as to block competitors' cash flow, and to offset the resulting short-term reduction of its own income concurrently raises prices on its products in another and protected market where it is immune from any competitive reaction. Can that kind of conduct of a monopolist be characterized as "legitimate means" or "ordinary business practices" not subject to condemnation?

III. Users of IBM's central processing units in a computer system constitute 65% of all users of computers and cannot utilize the other devices necessary to such a system ("peripherals") unless the devices are "compatible" with an IBM central processing unit. The trial court held that the relevant product market consists of only peripherals compatible with IBM central processing units (Product A). The Court of Appeals held that the relevant market also included peripherals not compatible with IBM's central processing units (Product B), doing so on the reasoning that a maker of Product A can with minimal expense switch to making Product B. Vital questions, presented by this reasoning,

concerning the concepts of "relevant market" and "interchangeability" for the purposes of Section 2, Sherman Act, and concerning monopolization and attempt to monopolize are these:

(a) Must not "relevant market" and "interchangeability" be determined from the standpoint of the *buyer* and *consumer*? Since the consumer cannot turn from Product A to Product B because B cannot serve his needs, and therefore they are not interchangeable for his uses, is it pertinent that the maker of Product A can adapt himself to making Product B?

(b) May one having monopoly power over Product A lawfully drive competitors away from making A into making B, under the reasoning that A and B constitute a single relevant market?

(c) Is not a finding of relevant market a finding of ultimate fact protected from alteration on appeal by the "clearly erroneous" rule of F.R.Civ.P. Rule 52(a)?

(d) The holding that a maker of Product A--peripherals compatible with IBM's central processing units—can with minimal expense make Product B—other peripherals—necessarily holds that whenever it desires IBM has the power to make Product B and by the very same conduct that destroys competitors making Product A destroy those making Product B. Is not IBM guilty of monopolizing all peripherals as the relevant market under the very reasoning of the Court of Appeals? Is not the existence of the power to exclude competition when it is desired to do so itself monopolization within the meaning of Section 2?

(e) Does not the same reasoning about relevant market demonstrate a "dangerous probability of success" of monopolizing the wider market? And where the trial court has found both that the dangerous probability exists and that IBM has a specific intent to monopolize—and those findings have not been disturbed—is not IBM at least guilty of attempt to monopolize under Section 2?

IV. Any more than one guilty of patent misuse may enforce the patent, may one guilty of violating the Sherman Act have

the aid of the courts to protect trade secrets in the product with respect to which the violation occurs?

STATUTES INVOLVED

Sherman Act, Section 2 (Act of July 2, 1890, c. 647, § 2; 26 Stat. 209, as amended, 69 Stat. 282; 15 U.S.C. § 2):

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Clayton Act, Section 4 (Act of October 15, 1914, c. 323, § 4, 38 Stat. 731, 15 U.S.C. § 15):

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

STATEMENT OF THE CASE

In 1972 Telex, the petitioner, filed two suits against International Business Machines Corporation ("IBM") for violations of Sections 1 and 2 of the Sherman Act (F. 3, 5; App. 3, 4). The two suits were soon consolidated in a single complaint, and the case was tried in 1973.[2] On the eve of trial IBM counterclaimed for misappropriation of trade secrets under state law and for copyright infringement under 17 U.S.C. § 101 (F. 7; App. 6). The district court held that IBM had violated Section 2 of the Sherman

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2. This was after transfer by the Judicial Panel on Multidistrict Litigation to the District of Minnesota for coordinated pretrial discovery with other cases pending against IBM, *In re IBM Antitrust Litigation*, 342 F. Supp. 200 (Judicial Panel on Multidistrict Litigation, 1972) and return to Oklahoma (F. 5, 7, App. 4, 6).

Act to Telex's damage (App. 152, 160) but was reversed by the court below in a *per curiam* opinion (App. 266).

Before describing the proceedings in the two courts, we summarize the facts. The trial court made full and detailed findings (App. A, App. 1-187). Except in one respect hereafter noted, they were not disturbed on appeal. The following statement of facts is therefore largely taken from those findings (hereafter cited as "F" with appendix page reference) and from the opinion of the Court of Appeals (cited to the pages of the appendix).

A. Summary of the Economic and Industrial Matrix of This Case

This case involves the data processing industry "upon which most other industries of the country and countless businesses, as well as science and space explorations, vitally depend * * * which * * * in this ultra-modern setting may be unprecedented * * * because of increased inducements for, and vulnerability to, sophisticated submarket control" (F. 1, App. 2). The industry is "one ranking high in importance among the industries of the nation." The demand for its "products and services * * * has grown from $48 million in 1952 to $10.2 billion in 1970." (F. 17, App. 11) The industry is the central nervous system of our economy.[3] The immediate purchasers of its products and services are mostly large institutions such as the government, universities, and large industrial organizations (F. 18, App. 11). In the hearings before the Hart Committee on the Computer Industry,[4] the industry was characterized as having "become essential to the very functioning of our society" and as likely to produce change to our lives.

3. Brock, "The U. S. Computer Industry: A Study in Market Power" (Ballinger, Cambridge, 1975) hereafter cited as Brock, notes, p. 4, "In less than 25 years, computers have changed * * * to indispensable tools for all phases of business and government."

4. Hearings before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, U. S. Senate, 93rd Congress, 2d Session, on S. 1167, Part 7, July 23-26, 1974; statements of James Peacock, editor of EDP Industry Report, at p. 4935. These hearings are hereafter referred to as the Hart Committee Hearings.

The industry is dominated by IBM.[5] It has been in data processing for years, and when electronic technology was developed and introduced by others in the early 1950's it came to dominate electronic data processing. According to Fortune Magazine's list of 500 largest industrial corporations, IBM ranked fifth or sixth among the giants in assets and sales in 1970, 1971, and 1972, with assets of over $10 billion and sales around $9.5 billion annually.[6] Before the trial court's decision in this case, the market value of IBM stock owned by its stockholders was $53 billion, which equals the combined value of the country's three largest corporations, AT&T, General Motors and Exxon (Brock, p. 5).

IBM is now a defendant in 18 or more private antitrust suits charging monopolization or attempts to monopolize, and 12 of these suits, including the present one, relate to "peripherals".[7]

5. This vital industry is dominated by IBM not only in the United States but world-wide. In November 1973 the European Economic Commission (EEC), in Community Policy on Data Processing, described the application and industrial development of data processing as "crucial to the European economy," the "third largest world industry," penetrating "every walk of life" and "dominated by a single firm [with] * * * 60% of the world market," viz., IBM (quoted in Hart Committee Hearings, pp. 5334-5).

6. "* * * mere size is not outlawed by § 2. But size is of course an earmark of monopoly power," *United States v. Griffith*, 334 U.S. 100, 107 (1948).

7. Seven peripheral suits were consolidated for pretrial proceedings in the Northern District of California by order of the Judicial Panel on Multidistrict Litigation. *In re IBM Peripheral EDP Devices Antitrust Litigation*, 375 F.Supp. 1376 (1974). They are: *Marshall Industries, a Corp. v. IBM Corp.* (Civ. No. 73-3043-WJF, C.D. Cal.); *California Computer Products, Inc., et al. v. IBM Corp.* (Civ. No. 73-2331-F, C.D.Cal.); *Hudson General Corp. v. IBM Corp.* (Civ. No. 73-2796-F, C.D.Cal.); *Transamerica Computer Co., a Corp. v. IBM Corp.* (Civ. No. C-73-1832-WTS, N.D. Cal.); *ILC Peripherals Leasing Corp. v. IBM Corp.* (Civ. No. C-73-2238-RHS, N.D. Cal.); *Memorex Corp., et al. v. IBM Corp.* (Civ. No. C-73-2239-SC, N.D. Cal.); *Memorex A.B. (Sweden), et al. v. IBM Corp.* (Civ. No. 3-73-2240-ACW, N.D. Cal.). Later *Forro Precision, Inc. v. IBM Corp.*, Civ. No. 74-1653-RM, and *DFP Incorporated v. IBM Corp.*, Civ. No. 74-1920-M were filed in the Northern District of California and consolidated with the other seven. On May 5, 1975, the Judicial Panel on Multidistrict Litigation transferred two more cases to the same court: *Memory Technology, Inc. v. IBM*, Civ. No. 74-5051-S (D. Mass.), and *Sanders Associates, Inc. v. IBM Corp.*, Civ. No. C-7514 (D. N.H.).

IBM is a corporation which has twice been brought to final judgment for antitrust practices relative to data processing much like those in the present case.[8]

This case concerns certain devices classified as *peripherals*. An electronic data processing system consists of three major segments, the "mainframe" or *central processing unit* (in industry usage, a "CPU"), the peripherals , and software. The *central processing unit* is the device which electronically processes data; it is the heart of the system. It is, however, useless without peripherals to feed data into the processor and to receive the output in forms usable to man. Output *peripherals* include printers, viewing screens, graph or other picture drafting devices, tape drives, disk drives and various devices to store data. Input peripherals include tape drives, disk drives, card readers, memory units, data storage devices, and so on (App. 197). While these devices are called "peripherals", they actually constitute 50% to 75% of the total price of the hardware of an electronic data processing system (F. 38, App. 22). *Software* is the programming by which the machine and humans converse and by which the electronic aggregate is instructed to do the work desired (F. 44, App. 26, 27), and it is another major item of cost of a computer system (F. 40, 44, App. 24, 25).

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8. *United States v. International Business Machines Corp.*, 298 U.S. 124 (1936); *United States v. International Business Machines Corp.*, 1956 Trade Cas. ¶ 68245, p. 71,117 (S.D.N.Y.), 1963 Trade Cas. ¶ 70628, p. 77,574 (S.D.N.Y.).

It is also now under suit by the government in *United States v. International Business Machines Corp.*, 69 Civ. 200, S.D.N.Y., relative to all computer products.

In *Honeywell, Inc. v. Sperry Rand Corp.*, 1974 Trade Cas. ¶ 74,915 (D.C. Minn. 1973), although IBM was not a party, the court found that a 1956 arrangement between IBM and Sperry Rand was "an attempt by IBM and SR to strengthen or solidify their monopoly in the EDP [electronic data processing] industry" (p. 95,915, finding 15.25).

Peripherals like those with which this case is concerned[9] will not operate with every manufacturer's CPU but must be "compatible" with the CPU of a particular manufacturer (F. 47, App. 28, 29). If a peripheral works with a given CPU, it is said to be "plug compatible" with that CPU. Each manufacturer of CPUs makes peripherals that are plug compatible with its own CPUs. IBM does, and it does not make peripheral devices plug compatible with CPUs of other manufacturers, nor do other manufacturers of CPUs make peripherals compatible with CPUs not their own (F. 47, App. 28)

Beginning in 1966 a group of manufacturers who do not make CPUs but produce peripherals has grown up. Telex was the first, followed by others. Each must design its product to be plug compatible with particular CPUs; it must choose a particular make as its market target. IBM had almost 65% of all installed CPUs (F. 58, App. 37).[10] The next three largest CPU manufacturers—Univac (Sperry Rand), Honeywell and Control Data—each had revenues of less than 13% of IBM's electronic data processing revenues (F. 58, App. 37). Because most CPUs in use are IBM made, and because the CPUs manufactured by any single other constitute so slight a market, those who produce peripherals alone design and make them plug compatible with IBM's CPUs (App. 197). By the time of trial in this case there were 11 such in addition to Telex (App. 198). Neither Telex nor the other 11 plug compatible manufacturers ("PCMs") manufacture peripherals for non-IBM CPUs.

Thus, IBM, Telex and IBM's other peripheral competitors created and recognized in the realities of the marketplace a relevant market consisting of certain peripherals plug compatible with IBM mainframes.

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9. Tape drives, disk drives, printers, memories, and communication controllers. Each has a unique function (F. 42, 43; App. 26).

10. Its revenue, from CPUs plus peripherals (general systems), was greater, 73% of the total.

B. The Acts of IBM, Designed and Intended by It to Maintain its Monopoly and Effectuating its Purpose—Brutal Price Cuts on Competitive Peripherals Alone, Offset by Price Increases on Products Immune from Competition, Plus Long Term Leases Tying Up the Market, Reducing Competition's Cash Flow, Destroying Its Competitors' Ability to Obtain Venture Financing and Freezing Out Potential Competition

IBM originally had 100% of the market for peripheral equipment compatible to its own CPUs (App. 198). Conforming to the pattern the Sherman Act was designed to encourage, others were attracted to the business. As stated by a witness before the Hart Committee, "[w]hile these companies are relatively small by standards of the principal computer systems competition, they concentrated on the market for one or a very few specific peripheral device products, and they have been a more effective competitive force to IBM in these smaller market segments than any one of the principal computer system suppliers in the overall systems market." (Hart Committee Hearings, pp. 5030, 5031). The newcomers' products were better than IBM's comparable devices and were less expensive. Telex's products, in particular, were "in fact superior and were regarded by IBM as superior." (F. 72, App. 47.)[11] The presence of Telex products compelled IBM to improve its similar products (Brock, p. 19). By 1969 IBM's share of the market for peripherals compatible with its CPUs had fallen to 91%, taking peripherals as a whole, but was still as high as 95% on some devices (F. 66, App. 42, 43).

IBM was dismayed and concerned. It regarded plug compatible competition as one of its major business problems (F. 75, App. 49), and it embarked on a program to *contain* and *destroy* Telex and its other major peripheral competitors (App. 150, 151). In February 1970 it designated peripherals as a "Key Corporate Strategic Issue" (F. 73, App. 48), that is, an issue so pressing as

11. Except for the "interface", which has to be identical in order for the device to be plug compatible with IBM CPUs, Telex's products were not copies of IBM's comparable peripheral devices.

to require the consideration of the topmost management of this giant company, to the end of determining what to do about "competitive compatible products which replaced IBM products in an IBM computer system" (F. 50, App. 30) and how to "reduce profits for Telex and Memorex" (F. 51, App. 31).

In March 1970 IBM set up a "Peripheral Task Force," its purpose "being to study and recommend plans and product strategies *to impede the growth of IBM's plug compatible competition*" (F. 74, App. 48, 49). Plans were devised of which an IBM analysis brutally stated that the end result, for any competitor, would be a *"dying company!"*[12]

THE PRICE CUTS

IBM's first act was to announce a disk drive (2319A) at a grossly reduced price. This was no new product, embodied no technological advance, and was a price cut not justified by reduced manufacturing costs (F. 77, App. 50). The device was a "fighting ship" (App. 200) camouflaged by a change of model number "for the purpose of avoiding a general price [rental] reduction" to already rented disk drives (F. 78, App. 51). The trial court found that this "price cut was designed by IBM *specifically to contain plug compatible competition,*" "its primary purpose was to maintain control of the plug compatible disk market for IBM," and it "was introduced by IBM with the specific purpose and intent of suppressing plug compatible disk competition" (F. 79, App. 51). The price cuts were forecast by IBM to have maximum impact on Telex and IBM's other plug compatible competition (F. 76, 81, App. 50, 52). In December 1970 IBM announced still another disk drive (2319B) at sharply lower prices, which like the 2319A was no technological advance over prior configurations (F. 83, App. 53, 203), but "was designed by IBM as a predatory action *contrived to maintain* its

12. P. Ex. 141A is an IBM analysis which concludes, "PCM corporate revenues lower—no funds for mfg., eng.—dying company!" "PCM" means plug compatible manufacturer. The exclamation point is in the original.

94% control of the plug compatible disk market" (F. 84, App. 54).

None of IBM's conduct was geared to competition with systems manufacturers, leasing companies, software or consulting organizations or service organizations (F. 84, App. 54).

The price cuts were severe and grossly reduced Telex's income and that of the other plug compatible manufacturers. When IBM discovered that the cuts on disk drives had not destroyed Telex as a "viable" competitor, because they did not affect tape drives and printers, "IBM determined to deal more effectively with its plug compatible competition" and appointed another group of its highest executives[13] "to develop a new peripheral strategy and specific action programs to deal with plug compatible competition" (F. 91, App. 58, 59). It adopted a policy "to swallow whatever financial pills were necessary" (F. 91; App. 58, 59, 206); the words are those of Thomas J. Watson, Jr. then IBM's chief executive officer, uttered to the Management Review Committee. With its $10 billion of assets and $9.5 billion of sales, it was well able to swallow pills.

Its price cuts were steep. Thus the slash on the 2319A was $1325 per month rental from $2875 (F. 76, App. 50, 201). IBM's defense in this case and the one on which, essentially, it later prevailed in the court below, was that the price was one on which it expected to make at least a 20% profit (F. 111a, App. 74, 202), after succeeding in taking over leases that otherwise would be made by Telex and the other plug compatible competitors. If true, IBM had been making the monopolist's profit of 130% before peripheral competition became serious, a clear portent of what threatened the economy of the country once IBM succeeded in destroying the competition. Competitors' costs were 10% to 15% above IBM's (App. 202), a fact IBM well knew and on which its calculations were based (P. Ex. 492). A

13. This "Blue Ribbon Task Force" included the man now president of IBM.

further reality of the market was that, in order for IBM's peripheral competitors "to survive", they "would have to charge less than IBM for comparable products", in view of IBM's superiority in marketing techniques at which it was a past master. This too IBM knew (App. 151) and took into account in pegging its prices below the level of at which Telex and its other peripheral competitors could live. It knew that Telex and Memorex were its chief competitors. They were its targets. And it knew that they had to price below IBM in order to sell (App. 202).

Despite these facts, it did not content itself with reducing its prices merely to meet those of competitors; it grossly undercut them (App. 151), with the obvious purpose and intent of forcing them out of business.

THE LONG TERM LEASING PLAN

IBM made more price cuts on tape drives, disk drives and printers, Telex's entire product line. But that is not all. The computer industry differs from many other capital goods industries in that computers are generally rented by the manufacturer to the end user, and peripheral companies generally lease rather than sell, a fact which requires much more capital because revenue is delayed for several years after the cost of producing the product is incurred (Hart Committee Hearings, p. 5366; Brock, pp. 55, 189). By the decree of 1956 in *United States v. International Business Machines Corp.*, 1956 Trade Cas. ¶ 68,245, at p. 71,124, IBM had been required to make its leases for a term not longer than one year unless terminable on a 3 months' notice, but that injunction had expired in 1966. Accordingly, before 1971 IBM's leases were terminable by the lessee on short notice. In May 1971, IBM offered a long term leasing plan ("Fixed Term Plan" or "FTP") (F. 94, App. 60) and in March 1972 an "Extended Term Plan" (F. 99, App. 63). Under IBM's new plan, lessees were tied up for long terms with "punitive termination provisions" (App. 151).

An IBM analysis showed that these term leases would lock-out the plug compatible competitors from the market for 24 months, turn their profits into losses and defer profits so long that the competitors could not develop follow-on products and would die (P. Ex. 141A). Another IBM analysis calculated that, although the Fixed Term Plan would cost IBM $75.6 million in 1971 and 1972, it would reduce the competition of plug compatible manufacturers so as to increase IBM's later revenues and "make the total effect" a gain "of $714 million between 1971 and 1975" (F. 93, App. 60; P. Ex. 391A-057).

The trial court found that the "benefits anticipated by IBM in connection with the adoption of FTP revolved around *the suppression of IBM's plug compatible competition*" (F. 96, App. 61). IBM estimated that the Fixed Term Plan would "cut IBM's plug compatible competitors' order rate by 50%" and described the competitive restraints that its actions were imposing on plug compatibles as resulting in "the competitor [facing] harder selling and harder installation." (F. 104, App. 68.)

THE PRICE INCREASES WHERE IBM WAS IMMUNE FROM COMPETITION

Nor was that all. IBM's central processing units *were both immune from the competition of the peripheral manufacturers* and *immune from the competition of other CPU manufacturers.* And so IBM not only refrained from placing its CPUs under the long term lease plan but *raised the prices on its CPUs* within two months of reducing prices on peripherals (F. 97, App. 62). As the Court of Appeals noted (App. 207), "IBM's central processing unit price increases *were designed to offset the decrease* on disk, tape, and printer products placed under the Fixed Term Plan". IBM calculated that the "net effects of the FTP and price change will probably be a wash * * * and no system decreases were forecast" (F. 98, App. 63). The end result was that the customers using both IBM's CPUs and its peripherals paid no more, for the increase in price of CPUs was offset by the decrease in the price of peripherals. Conversely, IBM received no less.

IBM was able to raise prices on CPUs because it was there immune, in four ways, from any CPU competition and from any adverse or retaliatory consequences.

First. There was the "wash effect".

Second. It need not fear new CPU competition. "Capital requirements for effective entry into the integrated systems business are probably over a billion dollars" (Brock, 57, 59, 60). Indeed, RCA abandoned that business in 1971 with a pre-tax write-off of $490 million, and General Electric did so in 1970 (F. 19, App. 12; Brock, pp. 59, 60).

Third. IBM had no fear that those already in the CPU business would undercut it. The CPU industry is oligopolistic. As already noted (p. 9, supra), "IBM was the leading company" in making CPUs and none of the next three had more than a fraction of its revenues. IBM could rely on sluggish or non-existent response from its current CPU competitors while it turned its attention to ravaging its peripheral competitors.[14]

Fourth. CPU lessees of IBM were *locked in* and could not abandon IBM CPUs for those of another manufacturer. A complete computer system includes the mainframe, plus the peripherals that go with it, plus the software. The peripherals account for more than half the cost of the hardware, and the software constitutes another large portion of the cost of the system, which the user has bought or has developed over a period of time at great expense. Software is adapted to the particular make of CPU (F. 40, App. 24), and peripherals compatible with IBM's mainframe will not work with CPUs made by others (F. 47, App. 27). Consequently, if a lessee of an IBM mainframe were to respond to IBM's rental increases by throwing out the IBM mainframe and installing a competing one, he would have to replace his peripherals, buy new software, reconstruct his data

14. Compare the motor car industry, which is oligopolistic (*Ford Motor Co. v. United States*, 405 U. S. 562 (1972)). A manufacturer of automobiles could cut prices of replacement parts to destroy independent accessory manufacturers and increase the price of the completed automobile to offset his price cuts on replacements, secure that competing automobile makers would be more likely to match his price increases than not.

base (the cost of which "would be prohibitive regardless of the cost of the new machine" (Brock, p. 50)), be subjected to disruption of his business from equipment removal and installation (Brock, pp. 109, 133), and retrain or replace programmers and operators who tend to be specialized to a particular kind of CPU (Brock, p. 49).

All these factors constituted an impermeable economic barrier to customers doing anything but leadenly accept IBM's price increases on CPUs. The whole impact of IBM's actions fell on Telex and the other peripheral competitors, and so it was designed. IBM banked on this "lock-in" effect. A Wall Street analysis of "IBM strategy", noted on its face by an IBM official as the "most thorough . . . assessment," stated that "peripherals lock-in futher protects Mainframes" and that the Lock-in strategy envisaged that "once locked in, price competition is less material" (P. Ex. 139).

IBM'S INTENT AND PURPOSE

As already seen, the purpose of IBM's acts was to strike down its peripheral competitors and regain its total hold on the market. Examining all IBM's explanations, the court further found (F. 100, App. 64, 65) that

> "preponderant evidence demonstrates that IBM's fixed term plan was generated and implemented at the time it was with the primary intent and purpose of suppressing plug compatible competition and to maintain its monopoly power in the plug compatible disk, tape and printer markets and the general plug compatible market for peripheral devices."

On "the record as a whole", the court rejected IBM's "construction" of what it did as "bland" (F. 101, App. 65) and found that it "effectively suppressed the growth of plug compatible competition in the plug compatible disk, tape and printer markets", "effectively contained IBM's competition in the plug compatible market for peripheral devices" (F. 103, App. 67), "lowered the price of its FET monolithic memory products and raised prices on its CPU with the primary purpose of creating barriers to entry for potential plug compatible memory competitors" (F. 107, App. 70), and its marketing actions "were particularly intended to reduce profits for Telex and Memorex" (F. 51, App. 31). As for IBM's contention that it was simply trying to become more competitive and meet competitive efforts, the court rejected it as "overpowered" by the whole record (F. 96; App. 61).

BARRIER TO ENTRY OF NEW COMPETITION

Moreover, the effect of IBM's acts was to erect a barrier to entry of new competition. The trial court so found (F. 107, App. 70), and the court below did not dispute the finding. One already in a business may hang on doggedly, but new money will not enter an industry with the prospect of slim returns.[15] New money was planning on entering the peripheral business, and IBM's plan was devised to head it off. The trial court found (F. 49, App. 30) that for "several years IBM studied possible market and product actions which would minimize potential entry of new competitors into that market [peripherals plug compatible to IBM CPUs]." The work of the task force set up by IBM in March 1971 with the mission of developing a strategy to "control the market penetration that was forecasted for plug compatible memory products"

> "included an attempt to fix a price * * * that *would influence potential plug compatible competitors to stay out of the market*" and IBM set the monthly rental price at an amount "which was less than the amount reporting experts had indicated a *potential competitor* would be required to charge in order to enter the market and be profitable and viable." (F. 108, App. 71)

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15. Dr. Brock, p. 112, comments:
"Companies contemplating entering a new market are carefully attuned to the profit possibilities in that market. If the price is cut enough that the market does not appear profitable, companies will not make the investment. However, once a company has entered a market, it will be reluctant to leave if there is any possibility of future profits. Consequently, a much more substantial price cut would be required to eliminate established competition than to prevent new entry."

As a result of the freeze on new investment capital "Telex's ability to secure financing has been impaired, and Telex has had to pay more for financing" (F. 115, App. 77). IBM planned it that way. The analysis characterized by an IBM official as a thorough assessment emphasized, "Financing is major Bottleneck-Throat narrowed" (P. Ex. 139).

These findings accord with all the knowledge on the subject. Dr. Brock (at p. 62) has observed:

> "Around 1970, the availability of funds for new computer companies began to diminish as general money conditions tightened, investor disillusionment with high technology companies set in, *and IBM's aggressive tactics created doubt about the viability of IBM competitors.*"

Datamation, a journal of the computer industry, issue of May 1972, summed up the reaction of the investment world to IBM's acts as follows:

> "During these days of the new hyperaggressive IBM, the computer industry as a venture capital investment has all the allure of the livery stable business. Many venture capitalists —if they have any money left—have been avoiding computer-related investments like the proverbial plague in the wake of IBM's price-cutting."

This reaction of the investment world is shown by P. Ex. 663, an investment letter from Bache & Co. July 12, 1972, widely circulated. Referring to IBM's actions, it recommended that holders of Telex, Memorex, and other peripheral stocks sell because:

> "It is clear from this that the plug-to-plug peripheral companies no longer control their own destinies since they are subject to the pricing policies of IBM,"[16]

a precise description of monopoly power in IBM. Eugene Collins, a security analyst specializing in the computer industry and generally regarded as Wall Street's expert on corporate peripheral

16. Loeb Rhoads & Co. Research Department Notes, July 1971, on Computer Peripheral Equipment, p. 12, makes a similar statement.

equipment manufacturers, testified before the Hart Committee (Hart Committee Report, p. 3361) that as a result of IBM's action:

> "New capital was no longer available. IBM's actions served notice to Wall Street that competition on a peripheral subsystem had little chance for success, and Wall Street listened".

He further noted that the ability of IBM to shift profitably from peripherals to central processing units and back again, depending on competition at the time, "makes it almost impossible to compete except on any level but on a total systems level, where the capital barrier to entry has proven to be almost prohibitive."

C. This Suit—Proceedings in the Trial Court

The trial court held that IBM had violated Sherman Act § 2 to Telex's damage in the sum of $86.5 million before trebling and entered judgment accordingly for damages and injunctive relief. (App. 188) It also awarded IBM nearly $22 million damages against Telex on the trade secrets and copyright counterclaims (App. 190).

Both courts below rejected IBM's capacious contention that the relevant market[17] was the "electronic data processing system together with products which are part of the system" (App. 228). IBM alternatively contended that the relevant market was all peripherals whether or not plug compatible with IBM's mainframe (App. 223).

The trial court found that the **relevant market** consisted of peripherals plug compatible with IBM's CPUs (F. 52, App. 32), and that in this market IBM had **monopoly power** (F. 68, 70; App. 45, 46). The basis of the finding on relevant market was explicitly stated. The court stated its task thus (F. 39, App. 23):

17. As it is agreed that the relevant *geographic* market is the entire country, we use the term "relevant market" to refer to the relevant *product* market. It is also unnecessary to distinguish between "markets" and "submarkets". "Well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes," *Brown Shoe Co. v. United States,* 370 U.S. 294, 325 (1962).

"In the realities of the marketplace, as recognized and acted upon by IBM as well as by the plaintiffs and their customers, it must be determined (a) whether plaintiffs' concept of relevant markets keyed peculiarly to devices plug compatible with IBM CPU's is sound . . ."

The trial court found that it was (F. 49, App. 30):

"*in the realities of the market and of competitive conduct,* neither IBM, its competitors nor the public have experienced difficulty in subdividing the EDP industry into markets roughly equivalent to the classification contended for by plaintiffs. IBM recognized as early as 1964 that a separate and distinct market for input-output peripheral products that were plug compatible to IBM central processing units was developing. For several years IBM studied possible market and product actions which would minimize potential entry of new competitors into *that* market. *Plug compatible manufacturers have been defined in IBM internal documents as 'those manufacturers which merely have to plug into IBM hardware to be operable.'*"

It also found (F. 37, App. 21):

"The record in this case shows that peripheral devices attached to IBM equipment but manufactured or supplied by others during the relevant period have grown into, and have been recognized as, a significant, distinct and important part of the EDP industry. Again, for the particular period mentioned, *we are not dealing with mere theory but with a historic, economic fact, transitory or otherwise.*"

In view of the fact that peripherals plug compatible with the CPUs of one maker are not usable with the CPUs of another, and (F. 50, App. 31):

"in view of the competition of other marketers furnishing devices plug compatible to IBM machines, such suppliers, IBM and the industry in general came to regard these lines especially as representing separate economic entities as a result, and for the purpose, of actual competition in the marketplace."

The market as defined by the trial court was "actually recognized by IBM itself" (F. 112, App. 75). For example, the head of its Peripheral Task Force stated at an executive session in July, 1970, that since the other peripheral manufacturers are "developing products that are plug compatible with our equipment, we, *and only we,* are directly competitive with them" (P. Ex. 386-048). The trial court rejected IBM's arguments about substitutability because a "relevant market cannot be enlarged by theoretical speculation as * * * potential substitutability having no substantial effect upon competition during a period in question." (F. 55, App. 34.)

Further finding that IBM's explicit purpose and intent were to destroy its competition, the court held IBM guilty of monopolization in violation of Sherman Act, § 2.

The trial court also dealt with the offense of **"attempt to monopolize"** under Section 2. Said it (App. 145):

"Should I be in error in the precise delineation of the relevant market and sub-markets * * * I am of the opinion, nonetheless, and so conclude, that attempted monopoly has been clearly made out by plaintiffs with like effect."

It found that IBM had the *"specific intent"* to monopolize regardless of how the relevant market was regarded (App. 152):

"Thus by unlawful and egregious conduct and *with specific intent to maintain and further achieve monopolization* under circumstances from which it can be and is fairly inferred that there was a dangerous probability of unlawful monopoly if defendant's conduct remained unchecked, the *defendant attempted to monopolize the EDP market for peripheral devices and each part thereof.* The court further finds accordingly that defendant has been guilty of violating Section 2 of the Sherman Act *not only by monopolization but by an attempt to monopolize.*"

It found further that the test of "dangerous probability of success" had been satisfied with IBM's "market dominance, or-

ganization capability and *determination to control* * * * IBM's program, if unchecked, will maintain or achieve monopolization in the relevant market and submarkets, whether or not the business of leasing companies is included and irrespective of the precise boundaries of any reasonable relevant market or submarkets." (App. 150)

In a summation deserving even more extensive quotation than space permits, the trial court said (App. 150, 151):

> "* * * the sum total of all of the evidence establishes that IBM undertook [the several acts described above] with specific and predatory intent of suppressing and eliminating its plug compatible competition and that such conduct taken pursuant to this anticompetitive purpose in fact suppressed and eliminated IBM's plug compatible competition to a substantial extent. Each of the price cuts, and * * * price cuts upon price cuts, were expressly formulated, analyzed, planned and aimed by IBM specifically at its plug compatible competition. Tape price cuts were substantial and were below, and were planned to be below, the prices charged by IBM's plug compatible competitors, including Telex, whereas IBM knew that, in order to survive, its plug compatible competition would have to charge less than IBM for comparable products. Price cuts through the FTP were accompanied by long term leases with punitive termination provisions planned to foreclose IBM's plug compatible competition from a substantial share of the plug compatible peripheral market on disks, tape and printers and were planned by IBM to foreclose, and did foreclose, IBM's plug compatible competitors from access to most of the plug compatible market * * * At the time IBM was aiming its price cuts and long term lease plans at its plug compatible competition, it offset those price cuts by price increases in markets in which it was not facing plug compatible competition. * * * All of these actions were taken by a competitor having a major share of the plug compatible peripheral market and submarkets, of enormous economic size and power and with the studied purpose of containing the competition of its plug compatible competition which was recognized as a threat to its market domination. The record

> leaves little room to doubt that this course of conduct did not represent normal competitive reactions to be countenanced under Section 2, but willful conduct with predatory intent. Here, as an analogy to the general law on attempts, there was an effort and intent to achieve, or maintain, an unlawful monopoly, coupled with the apparent present ability to do so, unless checked, in view of the intransigence, skill and organization with which this intent was pursued; and the powerful and resourceful base from which the program was launched."

D. This Suit—Proceedings in the Court of Appeals

Appeals by both parties from the single final judgment followed and were consolidated.[18] The Court of Appeals reduced the counterclaim award against Telex to $18½ million and, as so reduced, affirmed it (App. 265). But it held that IBM had not violated the monopolization proscription of Section 2 of the Sherman Act and reversed the antitrust decision, with directions to enter judgment for IBM, stating that it did so on two separate grounds (App. 264, 265). Although it first discussed the subject of "relevant market," it held, independently, that IBM's conduct was lawful, *regardless of the market* and *regardless of IBM's possession of monopoly power* (App. 237-254). It disagreed

18. The multiplicity of appeals was the result of lawyers' caution. Telex appealed and IBM cross-appealed from the counterclaim awards of an original judgment. Meanwhile, motions for amendment of the findings and judgment had been timely filed in the district court under F.R.Civ.P. Rules 52(b) and 59(a) and (b), resulting in amended Findings of Fact and Conclusions of Law and Amended Judgment. Because the judgment reserved all issues relating to foreign commerce, the court certified under F.R.Civ.P. 54(b) that there was no just reason for delay in entering the judgment so as to permit immediate appeal (App. 190, 191), but to protect against the possibility that Rule 54(b) was inapplicable the court also certified an interlocutory appeal under 28 U.S.C. § 1292(b) (App. 191, 192) IBM then appealed from this judgment and also petitioned the court below for leave to appeal under 28 U.S.C. § 1292(b) in order to avoid question of appealability, and it also cross-appealed from the counterclaim portions of the final judgment. Telex appealed from the final judgment and also cross-appealed from IBM's § 1292(b) appeal. The parties stipulated and the Court of Appeals ordered all the appeals consolidated.

with the trial court's chacterization of IBM's acts as "predatory," but it did not disagree with any finding of what the acts were, their context or matrix, of their effect on competition, or of the purpose and intent with which they were performed.[19]

It did not question the finding that IBM has monopoly power in a product market consisting of peripherals plug compatible with IBM's mainframes. But it held that the relevant market consists of all peripherals, whether plug compatible with IBM's mainframes or not, thus disagreeing only with the finding of ultimate fact that the relevant market consisted of *peripherals plug compatible with IBM's mainframes*. It did not disagree with any finding of fact on which that ultimate rested. The basis of its conclusion on relevant market was purely an assumption that, at no prohibitive expense, a manufacturer of peripherals for one type of CPU can design peripherals compatible with CPUs of others,—*not* that a user of IBM CPUs could possibly use any other peripheral (App. 232, 233).

But in choosing to upset the *finding of relevant market*, the Court of Appeals acted to no purpose. The only question to which an issue of "relevant market" in a Sherman Act § 2 case is pertinent is whether monopoly power exists. Yet the court below assumed that in the larger market as defined by it IBM had monopoly power. It specifically said so (App. 237):

> "If it be assumed that IBM had monopoly power during the period under consideration, which we do not decide, but the trial court so found * * * were the changes in marketing methods under such conditions made by IBM lawful?"

The basis of the holding that IBM did not offend Section 2, regardless of market, is the belief that IBM's practices would be deemed ordinary competitive conduct if performed by one who does not possess monopoly power (App. 250, 254). The court

19. The word "predatory" is of no significance. It is only a label expressing a judgment that the behavior is to be condemned. The law is not concerned with epithets but with economic and social concepts.

summed up the trial court's view of the law thus: One violates Section 2 if, possessing monopoly power, he maintains it with intent to monopolize (whether or not he wilfully acquired it), and the intent need not be evidenced by predatory practices. That view the Court of Appeals rejected, saying (App. 249):

> "This view of the authorities taken by the trial court is an extremely narrow one."

To the court below, if the acts employed by the monopolist are "ordinary business practices typical of those used in a competitive market" and if it attained its "position of monopoly power" by legitimate means, it "can change to utilize the marketing devices already employed by others in the market" and it can "reduce prices not below a point where they will derive a reasonable profit" (App. 249)—and all regardless of intent and purpose. The court was quite explicit about this (App. 253, 254).

Although the trial court had also held that, if its finding of relevant market was in error, IBM was guilty of an **attempt to monopolize,** the Court of Appeals ignored the difference between monopolization and attempt to monopolize and disposed of the issue of attempt with a sentence (App. 254): "The attempt to monopolize aspect need not be separately considered".

Because the core of the decision is a view of the lawfulness of of IBM's acts *regardless of market, of monopoly power,* and *of intent,* we shall consider that subject first. We shall show that IBM violated Section 2 by monopolizing if the trial court's finding of relevant market is correct, and, if that finding is not correct, then, *inexorably,* the very reasoning by which the Court of Appeals so concluded convicts IBM of violating Section 2 by attempting to monopolize. Finally, we shall show that the court's treatment of the concept of relevant market drains the concept of all meaning.

On all these points, we submit, the reasoning of the court requires review by this Court.

REASONS FOR GRANTING THE WRIT

No industry is more important to the nation than that involved here; for years to come its course of development will be shaped by the final decision in this case. Allowing the decision below to stand as the law would mean the end of independent peripheral manufacturers. Numerous other pending cases hang in the balance. The questions are vital, not only to this industry and to all who depend upon it, including the federal and state governments, indeed everyone,[20] but supremely at stake are the whole meaning and future of the national effort to control monopolization and attempts to monopolize, with the heretofore unbroken course of the law not only blocked but rolled back by the decision below.

I. At Stake Is the Law Concerning What Conduct Is Forbidden to the Single-Firm or Unilateral Monopolizer—Direct Conflict with Judge Learned Hand's Decision in Alcoa

Although the Sherman Act has been on the books for 85 years, and in that period this Court has had many occasions to deal with the Section 1 concepts of conspiracy and restraint of trade, the concept of monopolization under Section 2 has been before this Court in only a handful of cases, and they have been largely in the context of monopolization obtained by conspiracy and combination.[21] In that context, where the "dominating power

20. A witness before the Hart Committee testified (Hart Committee Hearings, pp. 5051-52): "The number of computer installations that exist today represents only two to three percent of the total computing power that will be in place 10 years from now."

21. The early cases of *Standard Oil Co. v. United States,* 221 U.S. 1 (1911) and its companion, *United States v. American Tobacco Co.,* 221 U.S. 106 (1911), *United States v. Terminal Railroad Association of St. Louis,* 224 U.S. 383 (1912), *United States v. Reading Co.,* 253 U.S. 26 (1920), *United States v. U.S. Steel Corporation,* 251 U.S. 417 (1920) and *United States v. International Harvester Co.,* 274 U.S. 693 (1927), were all cases in which a violation of Section 2 was charged in the context of conspiracies to monopolize or monopolization obtained by combination, acquisition, and poolings. So are *United States v. Crescent Amusement Co.,* 323 U.S. 173 (1944), *United States v. U. S. Gypsum Co.,* 333 U.S. 364 (1948), *United States v. Griffith,* 334 U.S. 100 (1948), *Schine Chain Theatres v. United States,* 334 U.S. 110 (1948), and *International Boxing Club of New York, Inc. v. United States,* 358 U.S. 242 (1959).
On occasion Section 2 has been mentioned in passing in Section 1 discussion.

was * * * obtained by deliberate, calculated purchase and control" or the like, it was long ago held that "such power, so obtained, regardless of the use made of it, constitutes a menace to and an undue restraint upon interstate commerce within the meaning of the Antitrust Act." *United States v. Reading Co.,* 253 U.S. 26, 57 (1920).

But in the 85 years of the Act, the Court has had cases concerning any issue of *unilateral monopolization* under Section 2 on only five occasions.[22] And on only three of the five has the vital question of what business conduct is foreclosed to one possessing monopoly power been touched upon,[23] all three largely in the form of approval of statements by great judges below. Yet, in this age of great aggregations, questions of unilateral monopolization are vital, calling for enlightenment and settlement. This Court's total direct pronouncements on the subject are to be found in a passage in the *Grinnell* case (384 U.S. 563), in the *Otter Tail* case (410 U.S. 366), in the opinion of Judge Wyzanski in the *United Shoe* case (so far as a *per curiam* affirmance is deemed to have endorsed it), and in the Court's endorsement in *American Tobacco* of the *Alcoa* decision.

The landmark on the subject is Judge Learned Hand's great opinion in the *Alcoa* case, *United States v. Aluminum Co. of America,* 148 F.2d 416 (2 Cir. 1946), the only judicial opinion ever to explore the concept of monopolization in depth and

22. *United States v. E. I. du Pont de Nemours & Co.,* 351 U.S. 377 (1956) (the *Cellophane* case); *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.,* 382 U.S. 172 (1965); *United States v. Grinnell Corporation,* 384 U.S. 563 (1966), *United States v. Otter Tail Power Co.,* 410 U.S. 366 (1973), and *United States v. United Shoe Machinery Co.,* 347 U.S. 521 (1954), a per curiam affirmance without opinion of the decision in 110 F.Supp. 295 (D. Mass. 1953).

23. The two others were the *Cellophane* decision and *Walker Process* case. *Cellophane* went no farther than to affirm a finding as to relevant market, in consequence of which there was no monopolization to consider. *Walker* went no farther than to hold that a patent obtained by fraud on the Patent Office is no defense to monopolization.

the first to probe the meaning of Section 2 as applied to a unilateral monopolizer. In *American Tobacco Co. v. United States,* 328 U.S. 781 (1946) this Court made a point to quote from *Alcoa* with approval.

A major reason why the writ should be granted is that the decision below is in conflict with Judge Hand's opinion. It doubts it, emasculates it, and quite reverses the direction of the law on the subject. Thus there is a *direct conflict* between the Tenth and Second Circuits. But the conflict is more than that. Because this Court could not muster a quorum eligible to sit in *Alcoa,* the Second Circuit decided it under a special grant of jurisdiction and was acting in the capacity of a court of last resort—of this Court itself. A disagreement by any other court of appeals with a decision of that stature commands review by this Court.

Alcoa and, until now, all subsequent decisions have recognized that *monopoly is a condition*, a *state of affairs*, not limited to a condition produced by acts thought to be "unfair" or "reprehensible". The basic definition of monopoly power is "the power to control prices or exclude competition".[24] It is irrelevant to that definition whether competition is excluded by prices below the monopolizer's costs. Indeed, the fact that a monopolizer need not price below his own costs in order to succeed in excluding competition serves to show both the enormousness and the enormity of his power; it demonstrates that his monopoly is all the more to be condemned. The only exception to unlawfulness of monopolization so defined is Judge Hand's "thrust upon" situation discussed below, i.e., a situation where the monopoly power has not been contributed *to in any way* by the monopolist's own affirmative acts. In the *Cellophane* case, 351 U.S. 377, 391, the Court referred to "the monopoly 'thrust upon' " of *Alcoa* as "left as an undecided possibility by *American Tobacco Co. v. United States*"; in other words, even a monopoly "thrust upon one" may

24. *United States v. E. I. du Pont de Nemours & Co.,* 351, U.S. 377, 391 (1956); *United States v. Grinnell Corp.,* 384 U.S. 563, 571 (1966).

be unlawful. Yet the court below has vastly widened that as yet unsettled exception.

Whether the affirmative acts of the monopolist are neutral or reprehensible, lawful or unlawful if committed by one lacking monopoly power, is totally extraneous. No doubt argument can be mustered why it would be better to permit the monopolist to sell at prices not below his costs, regardless of the effect on competition or even regardless of his purposes, on the theory that thereby the public gains the benefit of low prices.[25] But those are arguments of statecraft, to be addressed to Congress. They are not the philosophy of Sherman Act, Section 2. In adopting that Act Congress had no "idea of imposing an economist's model of competition on American industry"[26] or of enacting standards that change their meaning with every seasonal crop of economic theory, *United States v. Trenton Potteries Co.,* 273 U.S. 392, 397 (1927). Section 2 is informed by two other theses. One thesis is that short term gains to the public from low prices will inevitably vanish in longer perspective together with the incentive to provide better quality and service, after competition has been eliminated.[27] The other major thesis is that the social, moral and political values consequent upon a system of numerous and smaller producers are more treasured by society than pure economics.

That, we submit, is what Section 2 means. If, as we believe, it is the law already stated beyond question, this Court should grant the writ to remove the stultifying decision of the court below. If it has not already been stated beyond question by this Court,

25. Arguments of this kind use current economists' jargon about "umbrella pricing," "limit pricing," and the like; *e.g.,* note, 84 Yale Law Journal 558, "Telex v. IBM, Monopoly Pricing Under Section 2 of the Sherman Act."

26. A. D. Neale, "The Antitrust Laws of the U.S.A.: a Study of Competition Enforced by Law" (Cambridge Univ. Press, 2d ed., 1970), p. 13.

27. Compare the statement quoted at p. 16, supra; "once locked in, price competition is less material."

then the Court should grant the writ to put the matter beyond question.

The effect of the decision below is to adopt as the meaning of Sherman Act, Section 2, the "common law" of England as it came to rest in 1892 after years of confusion, in *Mogul Steamship Company v. MacGregor*, 23 Q.B.Div. 598, [1892] A.C. 25.[28] That view of the common law was *not* the common law as seen by many American courts.[29] S.C.T. Dodd, who "organized the Standard Oil Trust"[30], promptly denounced the Sherman Act in an article in the Harvard Law Review in 1893 as being contrary to centuries of experience and wisdom expressed in *Mogul*.[31] Others, regretting the lack of a Sherman Act in England, have hailed that Act because it protects against the evils of *Mogul* law. The *Mogul* case has been characterized as reflecting "the outlook of a judiciary brought up in conceptions and under conditions which had already lost their validity at the time of the judgment."[32] An interpretation of Section 2 of the Sherman Act that gives it the meaning of *Mogul* cannot be right.

28. The basic notions of Mogul are illustrated by these passages from the opinions:

> ". . . what can be meant by 'out of the ordinary course of trade'? I should rather think, as a fact, that it is very commonly within the ordinary course of trade so to compete for a time as to render trade unprofitable to your rival in order that when you have got rid of him you may appropriate the profits of the entire trade to yourself." (p. 37)
>
> "The object of every trader is to procure for himself as large a share of the trade he is engaged in as he can." (p. 58)

29. A. D. Neale, supra, footnote 26, at p. 14.

30. So stated in his biography in Who's Who in America, 1906-7.

31. S.C.T. Dodd, The Present Legal Status of Trusts, 7 Har. Law Rev. 157, 162-166.

32. Friedmann, Law in a Changing Society (Univ. of California Press, 1959), p. 266. Dr. Friedmann was Professor of International Law and Director of International Legal Research, Columbia University.

A. ONE POSSESSING MONOPOLY POWER, HOWEVER ACQUIRED, DOES NOT HAVE THE FREEDOM OF COMPETITIVE CONDUCT POSSESSED BY ANOTHER NOT SO SITUATED

In the same year as *American Tobacco* (1946) this Court held in *United States v. Griffith*, 334 U.S. 100, that neither specific intent "to restrain trade or to build a monopoly" nor acts violative of Section 1, nor any unlawfulness whatever in the acts of themselves, is necessary to a violation of Section 2 (p. 108).[33] As an example, large-scale buying, though not unlawful *per se* "may not, however, be used to monopolize or to attempt to monopolize * * *" (p. 108).

Griffith involved a conspiracy. But by the time of *United States v. Otter Tail Power Co.*, 410 U.S. 366 (1973) the law, as we submit it to be, was recognized, even by the dissenting justices, as the "familiar Sherman Act formula" under which the unilateral possessor of monopoly power acting to preserve that power is guilty of an antitrust violation (p. 383). What was before the Court in *Otter Tail* was as lawfully acquired a monopoly as can be imagined, a regulated natural monopoly. Yet Otter Tail was held to have violated Section 2 because it refused to sell power to a municipal corporation or to transmit power for it; it "used its monopoly power in the towns in its service area to foreclose competition or gain a competitive advantage, or to destroy a competitor." The dissent differed only in the belief that the usual antitrust formula is inapplicable to a "highly regulated natural monopoly industry" subjected to the "specific regulatory apparatus" of the Federal Power Act.

Judge Wyzanski in *United States v. United Shoe Machinery Corp.*, 110 F.Supp. 295 (1953) (aff'd *per curiam* 347 U.S. 521) understood *Alcoa* and *Griffith*. Said he (p. 297):

> "Since Judge Learned Hand's opinion in 1945 * * * and * * * United States v. Griffith * * * that provision of

33. The Court said (at p. 107):

> "It follows *a fortiori* that the use of monopoly power however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful."

> § 2 * * * has been interpreted as to reach any enterprise that has exercised power to *control* a defined market, if that power is to any substantial extent the result of barriers erected by its own business methods (*even though not predatory, immoral, or restraining trade* in violation of § 1 of the Sherman Act, 15 U.S.C.A. § 1), unless the enterprise shows that the barriers are *exclusively* [emphasis is the court's] the result of superior skill, superior products, natural advantages, technological or economic efficiency, scientific research, *low margins of profit maintained permanently and without discrimination,* legal licenses, or the like."

So also, on remand of *Alcoa* to the district court, Judge Knox understood its teaching, *United States v. Aluminum Corporation*, 91 F.Supp. 333 (S.D.N.Y., 1950): "Judge Learned Hand had demonstrated that [there was no] requirement of abusive practices in addition to that of monopoly power" (p. 341), no requirement that conduct be "predatory". The law had changed "in substantive emphasis from 'abuse' to 'power'" (p. 342). So, later, Professor Turner summed it up: "Alcoa clearly consigned the abuse theory of monopolization to limbo."[34]

Plainly Judge Hand's decision was that under Section 2 it is not necessary to convict the defendant of "practices unlawful in themselves." He added (p. 148 F.2d at 432):

> "So here, 'Alcoa' meant to keep, and did keep, that complete and exclusive hold upon the ingot market with which it started. *That was to 'monopolize' that market, however innocently it otherwise proceeded."*

Alcoa thus held that conduct need not be subject to adjectives sinister in tone in order to bring the possessor of monopoly power over the line from permissible conduct into illegality under Section 2, and that it is no defense to have done no more than use maneuvers honestly industrial or to have endeavored only to preserve the monopolist's share of the market. It is

34. Turner, Antitrust Policy and the Cellophane Case, 70 Har. Law Rev. 281, 292 (1956).

enough *either* (1) that the monopolist meant to preserve its dominating hold, or (2) that among other reasons, whatever they were, he acted with intent to prevent competition.

In *Alcoa* Judge Hand further demonstrated the irrelevance of the fact that Alcoa had not made exorbitant profits (148 F.2d at 426, 427). It is no defense to a price fixing conspiracy that the prices are "reasonable"; the offense under Section 1 lies in the concert, and it is said that courts have no competence to determine the reasonableness of prices, *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1926). Similarly, courts have no more competence to determine reasonableness of prices of a single firm monopolizer, and the offense under Section 2 lies in the monopolization. Yet here IBM cannot claim even reasonableness of price, for it has not maintained "low margins of profit * * * permanently", to use Judge Wyzanski's phrase, or avoided discrimination.[35] The fact that IBM reduced its profits in order to drive out Telex and Memorex and warn off new venture capital faces Judge Hand's statement:

> "Indeed, it may be thought a paradox to say that anyone has the monopoly of a market in which at all times he must meet a competition that limits his price. *We shall show that it is not."* (148 F.2d at 425)

In a famous passage Judge Hand also said (p. 427):

> *"Many people believe that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition* to let *well enough alone. . . .*
>
> * * *

35. As noted at p. 11 supra, the new configurations of IBMs disk drive were camouflages to conceal from current lessees that lower rents were being charged new lessees. Evans, President of IBM's Systems Development Division, testifying concerning the price cut, said (Tr. 4021, R. App. T-1256):

> "The Court: So by means of restricting it to the three-spindle configuration, you could have the benefit of cutting prices without having the economic impact of cutting prices?
>
> "The Witness: That's right."

> "Be that as it may, that was not the way that Congress chose; it did not condone 'good trusts' and condemn 'bad' ones; it forbad all. Moreover, in so doing it was not necessarily actuated by economic motives alone. It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few. *These considerations * * * the decisions prove to have been in fact its purposes.*" (p. 427).

The portions italicized are statements this Court "welcome[d] [the] opportunity to endorse" by quotation in *American Tobacco* (328 U.S. at 813).

It is elementary that a trader in an entirely private business has a right to select those with whom he will deal, but the Court has often said that the right exists only "in the absence of any purpose to create or maintain a monopoly", *Lorain Journal Co. v. United States*, 342 U.S. 143, 155 (1951) and vanishes *either* "if accompanied by unlawful conduct" *or* if "conceived in monopolistic purpose or market control," *Times-Picayune Co. v. United States*, 345 U.S. 594, 625 (1953).

B. WHATEVER CONDUCT MIGHT OTHERWISE BE PERMITTED TO THE POSSESSOR OF MONOPOLY POWER, IT IS UNLAWFUL IF IT IS ANIMATED BY INTENT AND PURPOSE EITHER TO IMPEDE, HAMPER, OR DESTROY PRESENT COMPETITION OR TO FORESTALL NEW COMPETITION.

In the presence of an intent to prevent competition the condemnation is inexorable. So Judge Hand had said (148 F.2d at 428), and in *United States v. Grinnell*, 384 U.S. 566 (1966) the basic formulation and the significance of purpose were stated tersely (at pp. 570, 571):

> "The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. We shall see that this second ingredient presents no major problem here, as what was done in building the empire was done plainly and explicitly for a single purpose. * * *"

The quotation shows that the rule applies, not merely to acquisition of monopoly power, but also to *maintenance* of that power. In the presence of "purpose", "superiority of product, business acumen, or historic accident" lies weightless on the scale.

When *Alcoa* returned to the trial court, Judge Knox observed, *United States v. Aluminum Co. of America*, 91 F.Supp. 333, at 415:

> "* * * it may happen that a single firm, by skill and industry, may succeed to such power as will, when *coupled with the requisite purpose, or intent*, offend against the law. And to find this 'purpose or intent', * * * it is not necessary that the firm indulge in unfair competitive practices. It is enough that its strength developed as a consequence of competitive activity of a kind that, at its inception, was entirely lawful. This rule exempts from liability only the monopolist whose power is *accidentally* thrust upon it by some unprecedented and unforeseeable market occurrence; *and as to whose power its own efforts could, in no way, be said to contribute.*"

To be "honestly industrial," and thereby come within the only exception to Section 2's condemnation, there must be no contribution whatever of any purpose to exclude competition.

The court below argued (App. 254) that under *Times-Picayune Co. v. United States*, 345 U.S. 594, one may lawfully engage in the type of competition prevalent throughout the industry. On the contrary, what *Times-Picayune* held was that *if* the intent of a practice is "ambiguous", the fact that the practice emulates another's is relevant to illuminate the ambiguity (p. 624). Here IBM's intent was not ambiguous, it was explicit. IBM did the acts complained of, not to be more competitive, but for the explicit purpose of impeding, containing, and suppressing its peripheral competition, to maintain its control of the plug compat-

ible market. It designed its tactics to have maximum impact on that competition (See p. 11, supra). Furthermore, *Times Picayune* involved attempt to monopolize, not monopolization, and in an attempt case a "specific intent" is required (p. 626).

United States v. Grinnell Corp., 384 U.S. 563 (1966) held that "pricing practices that contained competitors were" unlawful and exclusionary (p. 576). Here IBM's practices were designed to contain its peripheral competitors, particularly Telex, and succeeded in doing what they were intended to do.

C. CONTRAST OF THE FOREGOING PRINCIPLES WITH WHAT THE COURT BELOW SAID WAS THE LAW

The court below flatly said (App. 253):

> "we do not accept the requirement that the only permitted exceptions, or that the 'thrust upon' shorthand description means that the events or acts must be entirely involuntary. * * * There must be some room to move for a defendant who sees his market share acquired by research and technical innovations being eroded by those who market copies of its products."

With this view of the law, the court below directly challenges Judge Hand's *Alcoa* opinion, which it openly dismisses as unsound except as to the precise passages quoted in *American Tobacco*, 328 U.S. 781. Only as to those quotations did it regard this Court's *American Tobacco* opinion as even pertinent. (App. 252) Constrained to acknowledge that Judge Hand's "thrust upon" analysis has been generally recognized and often quoted or paraphrased, it brushed these facts aside by saying that "there is no detailed consideration of the meaning or scope of the several elements mentioned in the context of monopoly power lawfully acquired", and that "the 'thrust upon' exception has been more frequently used in reference to the attainment of a monopolistic position than in reference to what one with legitimately acquired monopoly power may do." (App. 252)

Were these strictures true, the time has come for the Court to give that "detailed consideration of the meaning or scope" of

monopolization when monopoly power has been lawfully acquired which the court below says is lacking.

D. THE CONTRAST WITH THE PRINCIPLES REVIEWED ABOVE IS EVEN SHARPER WHEN LAID ALONGSIDE OF WHAT THE COURT BELOW ACTUALLY DID

Furthermore, the law espoused below, unsound as it is, does not even fit the facts as found in major findings left undisturbed.

The court of appeals ignored the fact that IBM's price cuts and Fixed Term Lease plans were a barrier to new money to finance new competition in the peripheral industry and were designed by IBM to be so, as fully discussed at pp. 17-19, supra.

The court also ignored the fact that IBM was engrossing the whole market. Even if the law permitted one possessing monopoly power to use ordinary competitive tactics to the end of holding a competitive share of the market, it cannot be that he may do so to maintain a hog's share. Before putting into effect the practices assailed in this case, IBM had over 91% of the market for IBM plug compatible products (p. 10, supra). Its forecast of the worst consequences if it did nothing was that competition would get 28.7% of the plug compatible disk market and 19% of the plug compatible tape market, by 1976 (F. 96, App. 62), which would still leave IBM with over 71% of the one and 81% of the other, both still monopoly positions. Merit or no in the view of the court below that there "must be some room to move for a defendant who sees his market share * * * being eroded," this was more than "room to move". To hold that one possessing so large a dominance may gun down competitors in order to preserve it so long as his methods are permissible to one having a modest share of the market and a shorter purse is to defy the animating concepts of Section 2.

The decision also stumbles on the fact that IBM did not place its CPUs under the Fixed Term Plan and, while cutting prices on peripherals, *it raised prices on CPUs where it did not have to encounter competition or retaliation* and thereby offset what it lost from cutting prices on the products its peripheral competitors sold (See pp. 14-16 supra). This, in all economic sense,

is exactly what was condemned in *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954)—raising prices in a protected market in order to cut prices and drive out competition in a competitive one.[36] Allied to this, economically, is the fact that some of the price cuts were a camouflaged discrimination among its peripheral lessees (p. 11, supra).

The court of appeals argued that the price increases on CPUs were not found to be unreasonable and added that there were improvements (App. 247). There was no evidence of improvements in the CPUs on which prices were increased in 1971 following the price cuts of the Fixed Term Plan, and IBM never assigned improvements as a reason for those increases. The trial court found that the only reason for these increases was to "offset the reduction in prices on peripherals." If the CPUs were better, it follows that the public was denied an improved CPU at no increase in price because IBM sought to destroy peripheral competition. Surely, this was an abuse of monopoly power. The Court of Appeals' justification is a damnation.

Finally, reliance on the supposed fact that IBM did not price-cut below its costs is misplaced. To allow one having monopoly power to undercut competitors to the point of their destruction because it remains above its own costs is to say that the monopolist may use the advantages bestowed on it by monopoly to legalize that monopoly! And IBM, secure in the knowledge that from its past dominance its costs are less than its peripheral competitors' and that it can bear a price destructive to them, is simply exercising its monopoly power.

Moreover, the statement by the court of appeals that the trial court found that IBM would still make a "reasonable" profit (App. 250) misreads the record. Considering the fact to be irrelevant, Telex offered no evidence to establish IBM's costs or profit, and the trial court so noted and added, F. 111a (App. 74), that IBM *anticipated* that it would make a profit at its reduced

36. So also, *Atlas Building Prod. Co. v. Diamond Block & Gravel Co.*, 269 F.2d 950, 956, 957 (10 Cir. 1959).

prices and with its Fixed Term Plan. The court did not find that IBM would make a profit, and it took pains to add:

> "Those profit margins in part, of course, would have been achieved by obtaining leases of products which would have otherwise been made by Telex and other PCM's [plug compatible manufacturers]."

That is, the continued profitability to IBM would stem from *success in excluding competitors.*

Nor did IBM rest with price cuts. It conceived and put into effect its Fixed Term Plan.

II. The Reasoning of the Court Below About Relevant Market Not Only Does Not Escape the Conclusion of Monopolization But Compels the Conclusion That IBM Was in Any Event Guilty of an Attempt to Monopolize.

Before IBM embarked on the practices Telex assails, it had 95% of the market for peripherals plug compatible with its own CPUs, and by those practices will have achieved 100%. As its CPUs are 65% of all CPUs, its percentage thus ranges from 61¾% to 65% of all peripherals. (pp. 9, 10 supra). This is already on the borderline of being by itself monopoly power of a market of *all* peripherals under Judge Hand's oft quoted numerical test, that 90% is enough to constitute a monopoly, 33% insufficient, and "it is doubtful whether sixty or sixty-four percent would be enough," 148 F.2d 416, 424. Since it is now accepted that monopoly power depends on no prescribed set of percentage figures and may exist with lesser percentages, these facts would be enough to infer monopoly power in a market consisting of all peripherals even were there no more, *United States v. Grinnell Corp.*, 384 U.S. 563, 571.

But there is more. *The significance of what the Court of Appeals has said* in deciding that the relevant market consists of all peripherals and not just those plug compatible with IBM mainframes is that IBM has the power to acquire 100% of the market of all peripherals. That decision rests on the conclusion

that with minimal expense Telex and other plug compatible manufacturers (PCMs) can make peripherals plug compatible with any mainframe. An expense minimal for them is infinitesimal for IBM. Thus IBM, at a wink from its chief executive, can make peripherals plug compatible with the CPUs of any other system. Then, by the same practices by which it has ruined the manufacturers of peripherals plug compatible with its own CPUs, it can destroy those manufacturing all other peripherals and have 100% of the market for all.

The fact that it has not yet made peripherals plug compatible with other CPUs is irrelevant. In *American Tobacco,* 328 U.S. 781 (1946), the very issue decided was that "Neither proof of exertion of the power to exclude nor proof of actual exclusion of existing or potential competition is essential to sustain a charge of monopolization under the Sherman Act." (p. 810) Section 2 condemns monopoly power "even though it remains unexercised" because the "existence of the power to 'exclude competition *when it is desired to do so*' is itself a violation of Section 2, provided it is coupled with the purpose or intent to exercise that power," *United States v. Griffith,* 334 U.S. 100, 106, 107; *United States v. Paramount Pictures, Inc.,* 334 U.S. 131, 173 (1948). "On the practical side," said Judge Knox in *United States v. Aluminum Corporation.* 91 F.Supp. at 346, "the mere existence of monopoly power is instinct with the threat of future violations."

The purpose or intent is present. In case of conspiracy to acquire monopoly power, the purpose and intent to use the power follow inexorably from the conspiracy to attain it. *American Tobacco,* 328 U.S. 781, 804. Yet, as said by Judge Hand in *Alcoa* in a passage quoted approvingly in *American Tobacco* (328 U.S. at 813), any distinction between conspiracy and monopoly is "purely formal; it would be valid only so long as the monopoly remained wholly inert; it would disappear as soon as the monopoly began to operate". Thus the district court in *Alcoa,* after remand, read Judge Hand's opinion and this Court's decision in *Griffith* as holding that "a 'purpose or intent' is present if the acquisition or

retention of the power comes about as a consequence of defendant's conduct or business arrangements" (91 F.Supp. at 342). To exonerate IBM on the ground that it has not yet trained its guns on peripherals plug compatible with CPUs of others, observed the trial court, would "permit and foster" "the pattern for a divide and conquer strategy of monopoly" (F. 49, App. 30).

And if IBM is not guilty of monopolizing the peripheral market as expanded by the court of appeals, it stands guilty of attempting to monopolize it. There is a divergence in lower courts as to what is necessary to constitute an attempt to monopolize,[37] for Ninth Circuit decisions hold that neither a relevant market nor a "dangerous probability of success," is necessary.[38] But we do not go so far. We may rest on the traditional and conservative view that an attempt to monopolize requires, in addition to a relevant market, a (1) specific intent, and (2) a dangerous probability of success. If both are present an attempt to monopolize exists, for Section 2 "directs itself against the dangerous probability as well as against the completed result." *Swift & Co. v. United States,* 196 U.S. 375, 396 (1905), *Lorain Journal Co. v. United States,* 342 U.S. 143, 153 (1951).

Both elements are here, and *both were specifically found* by the trial court regardless of whether the relevant market includes all peripherals. The findings are quoted at pp. 21, 22, supra. None of these findings was disputed by the Court of Appeals.

The same activities as will give IBM 100% of the market for peripherals plug compatible with its own CPUs will give it well on the way to 100% of all peripherals. It need only turn to them

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37. See, for example, Edward H. Cooper, Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section 2", 72 Michigan Law Review 375 (Jan. 1974); Levine, "Attempt to Monopolize Under the Sherman Act": Defendants' Market Power as a Prerequisite to a Prima Facie Case, 73 Colum. L. Rev. 1451 (1973).

38. *E.g., Lessig v. Tidewater Oil Company,* 327 F.2d 459 (9 Cir. 1964); *Industrial Building Materials, Inc. v. Interchemical Corp.,* 437 F.2d 1336 (9 Cir. 1970). These cases eliminate the requisite of "relevant market" because Section 2 refers to "any part of the trade or commerce".

"when it is desired to do so", *United States v. Griffith,* 334 U.S. 100, 107 (1948). But not even this danger to *existing* makers of peripherals for non-IBM CPUs is necessary, for, as noted, IBM's conduct has created a barrier to new capital in the peripheral industry, and one having a "substantial monopoly in its own area violates the 'attempt to monopolize clause' of § 2 when it uses its monopoly to destroy threatened competition," *Lorain Journal Co. v. United States,* 342 U.S. 143, 154 (1951).

In *United States v. Griffith,* 334 U.S. 100, 107, the Court used much the same language about Section 2 as was used in *Klor's v. Broadway Hale Stores,* 359 U.S. 207, 213, 214 (1959), a Section 1 case, that it makes no difference whether "the 'tendency [to monopolize] is a creeping one' or 'one that proceeds at a full gallop,' " for

> "Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups."

The trial court's findings on this subject are unassailable. Narrow as are the limits of appellate review under F.R.Civ.P. Rule 52(a) of any finding of fact in antitrust cases, they are narrower still with respect to a finding of design, motive, or intent. Such a finding deals with state of mind, must be based upon appraisals of credibility and inferences from conduct and statements, and "the proof is largely in the hands" of the adversary. *Poller v. Columbia Broadcasting Co.,* 368 U.S. 464, 473 (1962). It is therefore essentially immune from reversal on appeal under F.R.Civ.P. Rule 52(a). *United States v. Yellow Cab Co.,* 338 U.S. 338, 341 (1949); *Eastman Kodak Co. v. Southern Photo Materials Co.,* 273 U.S. 359, 375 (1927). In Judge Hand's words (*Alcoa,* 148 F.2d at 433), a finding of intent is "unassailable, except in the most exceptional cases".[39]

39. And it is immaterial that the finding of intent "appear[s] in the conclusions of law, for their true nature is not determined by their labels," *Benrose Fabrics Corp. v. Rosenstein,* 183 F.2d 355, 357 (7 Cir. 1950); *Houck v. Hinds,* 215 F.2d 673, 676 (10 Cir. 1954); *United States v. General Dynamics Corp.,* 415 U.S. 486, 508 (1974).

III. The Court Below Has Drained the Concept of "Relevant Market" of Meaningful Content.

The scope of appellate review on issues of fact in antitrust cases is narrow, placing on one seeking to overturn findings "an almost insurmountable burden,"[40] and a finding of what is the relevant market is a finding of *ultimate fact,* protected from appellate tampering by the "clearly erroneous rule" of F.R.Civ.P. Rule 52(a). Consequently, this Court has adhered to the trial court's findings of relevant market in the leading cases, whether the finding was of a market so broad as to preclude monopolization[41] or so limited as to sustain the charge (*International Boxing* and *Grinnell*[42]). *Zenith Radio Corp. v. Hazeltine Research,* 395 U.S. 100, 123 (1969) warned that under the clearly erroneous standard courts must be careful in antitrust cases not to decide factual issues *de novo.*

The court below paid lip service to Rule 52(a) but avoided it by applying an erroneous legal test which drains the idea of relevant market of any meaning. Its whole reasoning is summed up in one passage (App. 232, 233):

> "Manufacturers of peripherals were not limited to those which were plug compatible with IBM CPUs. These manufacturers were free to adapt their products through interface changes to plug into non-IBM systems. It also followed that systems manufacturers could modify interfaces so that their own peripheral products could plug into IBM CPUs. Factually, then, there existed peripheral products of other CPU

40. *International Boxing Club v. United States,* 358 U.S. 242, 252 (1959); *Besser Manufacturing Co. v. United States,* 343 U.S. 444, 446 (1952).

41. *United States v. E. I. du Pont de Nemours & Co.,* 351 U.S. 377, 381 (1956) (*Cellophane* case); *International Boxing, supra* at 251, 252.

42. In *United States v. Grinnell Corp.,* 384 U.S. 563, the Court accepted the trial court's finding of a broad market as being all services for protection of property through a central service station but a narrow one as excluding services not recognized by insurance companies.

> manufacturers which were competitive with IBM peripherals and unquestionably other IBM peripherals were capable of having their interfaces modified so that their peripheral products would plug into non-IBM's CPU."

Yet this statement says only two things. It says, first, that a manufacturer of peripherals, whether he makes only peripherals or entire systems, can make peripherals plug compatible with IBM's CPUs. Of course he can. *That is what this case is all about*, and, but for IBM's conduct, the consumer, the user of IBM's CPUs, would be using peripherals made by others. The statement, then, is irrelevant to the issue.

The only other thing said is that a manufacturer of peripherals, if he wishes, can with modest expense make peripherals that will be compatible with non-IBM CPUs. For purpose of this petition we shall assume this to be the fact, but if the writ is granted we can demonstrate that it is not but rests on selected bits of evidence contrary to the mass of evidence whose weight is for a trial court.[43] But it is alien to "relevant market" whether Telex or anyone else can make such peripherals; that is to say, whether they can go into a business different from the business they are in. To hold otherwise is to say that IBM may lawfully use its power to force Telex to abandon the manufacture of a product competitive with IBM and to go into the manufacture of a product which does not compete with IBM!

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43. For example, the Court of Appeals leaned on an extract from testimony of one Grant, that the expense of making a peripheral plug compatible with non-IBM CPUs might be $250,000. But Grant was speaking only of the *engineering* expense of designing an interface between one particular device and a given CPU. There are numerous devices and numerous CPUs. RCA alone had 3 different CPUs, and a device compatible with one would not be for another. To "make any market sense" the expense of engineering one interface would be multiplied by the product of the number of devices and the number of different CPUs. Morover, said Grant, engineering expense is but one item of expense. The market represented by a CPU made by anyone but IBM is "extremely small"; there is therefore marketing expense, and from any "business aspects", not mere original engineering, any effort to reach non-IBM CPUs "could be a multimillion dollar mistake" (T. 277, 315-317).

The testing question is whether the users of CPUs made by IBM—who constitute 65% of all users of computers—can use peripherals that are not compatible with their CPUs. The *answer is obvious. They cannot*. Those products are as as useless to their needs as if they were a volume of Sappho's poetry. To the consumer there is no interchangeability at all. It is of no interest to the user of an IBM CPU that Telex could, if it wishes, make peripherals compatible with a Univac computer. A user of an IBM computer does not have a Univac computer.

The terms "relevant market" and product "interchangeability" are but phrases felicitously denoting that the question whether conduct under scrutiny produces economic effects obnoxious to the law must be answered in the context of facts relevant to the inquiry. The "relevant market" is the area in which the economics are worked out, "the area of effective competition."[44] Except for some peculiar situation,[45] what the law is concerned with is impact on the buyer or *consumer*, and therefore the relevant market must be determined from his standpoint. The decisions about interchangeability *focus upon him, not the manufacturer*. Interchangeability of the product with other products is one of interchangeability for consumer use. It has nothing to do with whether a manufacturer can shift from making widgets to gadgets.

Until the decision below, all the cases accord. In the *Cellophane* case, 351 U.S. 377, the Court reiterated:

> "This interchangeability is largely gauged by the purchase of competing products *for similar uses* considering the price,

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44. *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 593 (1957).

45. It may be conceptually possible that, for some purposes, as in a Clayton Act, Section 7 case, interchangeability of production facilities is pertinent to ascertaining the relevant market. For example, in *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962), dealing with Clayton Act, § 7, the court raised the possibility, in footnote 42, by saying, "The cross elasticity of production facilities may also be an important factor in defining a product market within which a vertical merger is to be viewed."

characteristics and adaptability of the competing commodities." [pp. 380, 381].

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"Determination of the competitive market for commodities depends on how different from one another are the offered commodities in character or use, how far *buyers* will go to substitute one commodity for another. * * *. [p. 393]

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"* * * In considering what is the relevant market for determining the control of price and competition, no more definite rule can be declared than that commodities reasonably *interchangeable by consumers* for the same purposes make up that 'part of the trade or commerce,' monopolization of which may be illegal. (p. 395).

* * *

"In determining the market under the Sherman Act, it is the *use* or *uses* to which the commodity is put that control" (p. 395, 396).

United States v. Grinnell Corp., 384 U.S. 563, 571, said:

> "In case of a product it may be of such a character that substitute products must also be considered, as *customers* may turn to them if there is a slight increase in the price of the main product. That is the teaching of the du Pont case * * *."

Justice Fortas, dissenting on the facts but not on the law, observed in *Grinnell*:

> "The purpose of the search for the relevant geographical market is to find the area or areas to which a potential *buyer* may rationally look for the goods or services that he seeks." (p. 588)

In *International Boxing*, 358 U.S. 242, the relevant market was held to be championship boxing although any boxing contest always includes one ring, two boxers, one referee, fighting under the same rules and for spectators or viewers, because the consumer, who wishes to see a championship boxing contest will not accept a lesser bout.

Although *Brown Shoe Co. v. United States*, 370 U.S. 294, arose under Clayton Act, § 7, its teaching is entirely in point (p. 325):

> "The outer boundaries of a product market are determined by the reasonable *interchangeability of use* or the *cross-elasticity of demand between the product itself and substitutes for it.*"

Although the same manufacturer can make men's, women's and children's shoes, each was held to be a separate product market because so recognized by the public and "directed toward a distinct class of customers".

Brown Shoe emphasizes another factor—"practical indicia as industry or public recognition of the submarket as a separate economic entity" (p. 325) "Relevant market" does not turn on abstraction, theory, or comparison by an untutored eye. In *Times-Picayune Co. v. United States,* 345 U.S. 594, 612, n. 31 this Court said that

> "Useful to that determination is, among other things, the trade's own characterization of the products involved."

In *Grinnell*, 384 U.S. 563, 586, Justice Fortas noted that in a conspiracy case the conspirators delineate the relevant market by the market to which they direct their conspiracy. By the same reasoning, in a monopolization case the monopolist delineates the relevant product market by the market to which he directs his efforts of monopolization.

All this emphasizes the businessman's feel for the realities of the marketplace.[46] Here the industry as a whole regarded *peripherals plug compatible with IBM CPUs as a distinct market, and that is exactly how IBM looked at the matter.* The trial court so found (see pp. 20, 21, supra), and it found that when, in late 1969, IBM designated peripherals as a "Key Corporate Strategic

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46. In other areas of antitrust the businessman's feel is given great weight; *e.g., International Shoe Co. v. Federal Trade Commission,* 280 U.S. 291, 299 (1930): "The existence of competition is a fact disclosed by observation rather than by the processes of logic***."

Issue," the issue was limited by it to "competitive compatible products which replaced IBM products in an IBM computer system. * * * These plug compatible products were treated by IBM for competitive studies, strategies and other purposes as separate economic entities" (F. 50, App. 31).

IV. One Guilty of Violating Section 2 of the Sherman Act Should Not Be Entitled to Aid of the Courts to Protect Trade Secrets.

If the Court affirms the district court's decision that IBM violated Sherman Act, Section 2, we respectfully request the Court to determine whether an adjudged monopolist may use the courts to further his monopoly by giving him trade secret protection. This question was presented to the court below, and it refused to decide it because of its conclusion that IBM had not violated the antitrust laws. (App. 257, 258)

"One guilty of patent misuse is denied enforcement of his patent, despite the fact that patent rights are of constitutional dignity and protected because they serve a high public purpose.[47] Conduct amounting to much less than violation of the Sherman Act can be patent misuse, and a Sherman Act violation certainly is. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 140 (1969).[48]

There is no basis for confining the doctrine of misuse to patents; its application in patent cases is but an application of the principle that he who seeks the aid of the courts must come with clean hands, surcharged with the even weightier principle that courts will not enforce a private right used to subvert a clear public policy and that the protection of the public in a system of free enterprise is paramount, *Morton Salt Co. v. G. S. Suppiger*

47. *Bauer & Cie v. O'Donnell*, 229 U.S. 1, 9 (1913); *Morton Salt Co. v. G. S. Suppiger Co.*, 314 U.S. 488, 492 (1942).

48. Numerous decisions on the subject are cited in Antitrust Law Developments (A.B.A. Section of Antitrust Law, 1975), pp. 327, 328, and Antitrust Developments 1955-68 (A.B.A. Section of Antitrust Law, 1968), pp. 180-183.

Co., 314 U.S. at 492, 494; *Mercoid Corp. v. Mid-Continent Inv. Co.*, 320 U.S. 661, 666, 670 (1944). It is this doctrine that has also denied enforcement of trademark rights and copyrights (see cases cited in 314 U.S. at 494).

Protection of unpatented trade secrets is of much less standing than patent rights. It has neither constitutional roots nor even federal statutory roots; indeed, it was only by a divided court in *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974) that it was determined that protection of unpatented trade secrets is not inconsistent with the constitutional exclusiveness of patent rights. If a patent right must be denied protection when it has been involved in antitrust violation, *a fortiori* trade secrets should be denied protection where they are part and parcel of monopolistic activity violative of Section 2 of the Sherman Act.

It would be a gross anomaly if IBM, adjudged to have damaged Telex grievously by violation of Section 2, should nevertheless have and enforce against it a judgment of $18.5 million.

CONCLUSION

We respectfully submit that a Writ of Certiorari should issue and that the decision of the court below should be reversed with directions to reinstate the judgment of the district court that IBM has violated Section 2 of the Sherman Act and to deny IBM recovery from Telex upon trade secrets.

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